

Book review

Insurance law and the Financial Ombudsman Service

Dr Judith Summer

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Review by Jonathan Goodliffe, Solicitor

The author of this work, Dr Judith Summer, is currently a non-practising solicitor and academic legal writer. Publication of this work follows completion by her in 2009 of a PhD thesis on the Financial Ombudsman Service (FOS).

The book is a critical analysis of the functioning of the FOS in relation to insurance disputes. It confines itself to covering non-investment insurance products. So it does not address specifically products such as mortgage endowments and insurance bonds. The book may nonetheless be worth consulting in relation to a wider range of FOS complaints.

It starts with some helpful introductory chapters explaining the history of the FOS and how it functions. It analyses the FOS approach to insurance law issues such as policy construction, fraud and non-disclosure. It also covers in detail the most common non-investment insurance products which feature in FOS determinations and the issues which regularly arise, such as keys left in motor cars, valuation and proof of loss and pre-existing medical conditions.

The book includes in an appendix the full text of all non-investment insurance case studies from Ombudsman News (which are also available in soft copy on the FOS website). These case studies are used by the FOS in its newsletter to illustrate its approach to the exercise of its functions. The appendix also includes the FOS statistics and extracts from relevant statutes, rules and regulations.

Under section 228 of the Financial Services and Markets Act 2000 (FSMA) complaints to the FOS are “determined by reference to what, in the opinion of the Ombudsman, is fair and reasonable in all the circumstances of the case”. The author considers the FOS approach to such determinations and systematically compares it to how a court would approach the same issue.

These comparisons are impressively researched and presented. In some cases the author then questions whether the FOS is justified in or has fully considered the implications of departing from the outcome which would be arrived at by a court. Such issues arise, for instance, where the case studies themselves raise the question whether the FOS has itself arrived at a correct analysis of the legal position before proceeding to depart from it. A similarly critical approach is adopted where the author considers that the FOS has arrived at what might be the same outcome as a court, but by a different and, in her view,

sometimes inappropriate process of reasoning. An example of this is where the FOS relies on a code of practice rather than statute and case law.

On policy construction, for instance, she comments:

“The FOS should not be able to force insurers to make payments outside the terms of the contract when there is nothing inherently unfair about the contract terms or its sales process. Sometimes an event occurs which is bad for the claimant, but is simply uninsured. Sympathy for the claimant should not be relevant to policy construction.”

In relation to insurance fraud the author points out that the FOS departs from the approach adopted in the courts to the use of fraudulent devices, such as forged receipts, in support of genuine claims. The FOS takes the view that the claimant may recover despite such a fraud. The author exclaims that it is “astonishing” that the FOS did not refer to the judgment of the Court of Appeal in *Agapitos v Agnew* [2002] EWCA Civ. 247 which arrived at the opposite conclusion. The most obvious explanation is perhaps that it just missed the case!

The author points out that a non-technical approach to dispute resolution may prevent the FOS from being taken seriously by the courts or lawyers. Since the book went to print, however, the FSA has proposed in its consultation paper CP10/21 draft guidance that firms should “ensure that lessons learned as a result of determinations by the Ombudsman are effectively applied in future complaint handling” (proposed para 1.3.2AG in the Dispute Resolution Sourcebook – DISP).

There is one subject on which the author’s views are quite controversial. I pointed this out to her and she has discussed the subject further in her article in this issue of the BILA Journal. This concerns the right of “private persons” (in the extended and somewhat misleading FSA Glossary meaning) to claim damages for breach of FSA rules under section 150 of FSMA. This section, in conjunction with the FSA’s claims handling rules in its Insurance Conduct of Business Sourcebook (ICOBS) has, in my view, partly reversed the effect of the rule in *Sprung v Royal Insurance (UK) Ltd* [1997] CLC 70.

Notwithstanding this single major difference of opinion with the author, I consider this book to be an excellent tool in advising insurance clients on FOS complaints, especially when a judicial review (in most cases, of course, a difficult exercise) is being contemplated.